SUPREME COURT, U.S.
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No. 92-1183

In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether videotapes that focused on the genitals and pubic area of minor females constituted a "lascivious exhibition of the genitals or pubic area" under the child pornography statutes, 18 U.S.C. 2252, 2256(2)(E), even though those body parts were covered by clothing.

2. Whether the child pornography statutes, as interpreted by the court of appeals, are unconstitutionally vague and overbroad.

3. Whether petitioner had the requisite mental state to violate 18 U.S.C. 2252.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 977 F.2d 815. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment is reported at 776 F. Supp. 174.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1992. The petition for a writ of certiorari was filed on January 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct, and one count of knowingly possessing such visual depictions, in violation of 18 U.S.C. 2252(a)(2) and (4). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed. Pet. App. 1a-25a.

1. In March 1991, the U.S. Customs Service intercepted an order from a company in France for two videos, "Little Girl Bottoms (Underside)" and "Little Blondes." The order requested that the videos be sent to J. Richard Scott, 210 West Hamilton Avenue, No. 108, State College, Pennsylvania. Included was a check drawn on the account of petitioner Stephen Knox and bearing his signature. The check showed Knox's address as 210 East Hamilton Avenue, No. 25, State College, Pennsylvania. The Customs Service that month intercepted a mailing addressed to J. Richard Scott from the Netherlands, which contained a catalog advertising for sale videotapes of nude, semi-clothed, and clothed minors. The Customs Service investigators knew that Knox previously had been convicted of receiving child pornography through the mail. With the help of the Pennsylvania State Police, the Customs agents obtained a search warrant and conducted a search of Knox's apartment. Pet. App. 2a-3a.

Seized from petitioner's apartment were three video cassettes produced by the Nather Company, based in Las Vegas, Nevada. Agents also seized a

catalog from the Nather Company, with checkmarks by several videotape selections, envelopes addressed to Nather, mail order forms from Nather, and a carbon copy of a money order payable to the Nather Company for an amount about equal to the price of a single video. Pet. App. 3a.

The tapes showed various females between the ages of 10 and 17 dressed in bathing suits, leotards, underwear, or other similar attire. The children struck provocative poses, apparently at the direction of someone off-camera. The camera would typically zoom in on the children's pubic and genital area and display a close-up of that area for an extended time. The tapes themselves and the promotional materials distributed by Nather showed that the tapes were designed to pander to pedophiles. For example, one of the advertising catalogs stated (Pet. App. 5a):

> 'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

2. In 18 U.S.C. 2252, Congress made it a crime to transport, receive, or distribute any visual depictions that involve "the use of a minor engaging in sexually explicit conduct." It defined "sexually explicit conduct" in 18 U.S.C. 2256(2)(E) to include "lascivious exhibition of the genitals or pubic area of any person."

Based on the videotapes seized from his apartment, petitioner was charged with receiving and possessing child pornography, in violation of Section 2252.

Petitioner moved to dismiss his indictment before trial, on the ground that the videos did not contain an "exhibition" of the genitals or pubic area, since those areas were in all cases covered by clothing. The district court viewed portions of the videotapes that the parties stipulated were representative, and denied the motion. The court reasoned that the uppermost portion of the inner thighs, being in close proximity to the genitals, were included in the definition of "pubic area." Since the upper portion of the inner thigh was clearly exposed in the videotapes, the court held that the tapes contained an exhibition of the pubic area. Pet. App. 4a-5a.

After the court found petitioner guilty on both counts, he filed a motion for judgment of acquittal, along with an affidavit from a physician stating that it is anatomically incorrect to say that the pubic area includes the upper portion of the inner thigh. The district court denied the motion, finding that its filing three months after the entry of the verdict was untimely. Pet. App. 6a.

3. The court of appeals determined that the district court erred in its definition of "pubic area." Displaying any portion of the inner thighs, the court of appeals held, "does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)." Pet. App. 9a. The court of appeals went on to hold, however, that the statute's proscription of a "lascivious exhibition" of the genitals or pubic area did not mean that those body regions had to be nude. *Id.* at 9a-17a. Examining the language of the statute, the court of

appeals noted that the dictionary definition of "exhibit" is "to present to view," "to show publicly," or to "put on display in order to attract notice." The court of appeals found that the visual depictions at issue here clearly put the genitals and pubic area of the young girls "on display." Indeed, the obvious purpose of the tapes "was to 'attract notice' specifically to the genitalia and pubic area." *Id.* at 11a.

An examination of the legislative history of Section 2252 further persuaded the court that Congress did not intend to limit the statute's scope to nude displays. In earlier proposed legislation, it was clear that only nude displays were targeted, for the proposed statute would have proscribed "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." Pet. App. 11a (citing S. 1011, 95th Cong., 2d Sess. (1977)). Because Congress omitted any reference to nudity in the legislation that was enacted, the court of appeals considered the change to indicate Congress's intention to "criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd." Pet. App. 12a. Nor was there any indication in the extensive legislative history that the statute as enacted was intended to prohibit only nude portrayals. *Id.* at 13a.

The court of appeals also considered the rationale behind the federal child pornography statutes and the particular governmental interest in protecting the safety and welfare of children, and concluded that its interpretation of the statute was consistent with the purpose of the law. The court of appeals concluded (Pet. App. 15a-16a): "The rationale underlying the statute's proscription applies equally to *any lascivi-*

ous exhibition of the genitals or pubic area whether these areas are clad or completely exposed."

The court of appeals further held that its construction did not render the statute unconstitutionally overbroad, because the requirement in the statute that the depiction be lascivious was a sufficient limiting principle. Pet. App. 17a-19a. And because only a very small fraction of all pictures of minor children would be sufficiently sexually suggestive to qualify as lascivious, the court found that the statute was "directed at the hard core of child pornography." *Id.* at 19a (quoting *New York* v. *Ferber*, 458 U.S. 747, 773 (1982)).

The court of appeals also found the evidence sufficient to support the district court's finding that the videotapes traveled through the mail and that petitioner knowingly received and possessed the tapes. Pet. App. 19a-24a.

ARGUMENT

1. Petitioner renews his contention (Pet. 10-22) that the federal child pornography statute does not apply to lascivious depictions of children whose genitals and pubic areas are covered by clothing. There is no conflict among the circuits on this issue, as this case is one of first impression. Further review is therefore unwarranted.

Petitioner claims (Pet. 10-11) that the court erred in finding that the language of the statute covers the visual depictions in this case since, he argues, an "exhibition" of the genitals or pubic area presupposes nudity of the area. But as the court of appeals pointed out, "exhibition" means "put on display," and "[t]he genitals and pubic area of the young girls in the Nather tapes were certainly 'on display' as the

camera focused for prolonged time intervals on close-up views of these body parts." Pet. App. 11a. Just as a foot or hand could be "exhibited" while covered with a sock or glove, so here the genitals and pubic area were "put on display in order to attract notice" to those areas. *Ibid.* (quoting *Webster's Third New International Dictionary, Unabridged* 796 (1976)).

The court of appeals correctly found no indication of any contrary intention in the legislative history. Petitioner cites several comments concerning the original legislative proposal on child pornography, which would have specifically prohibited "nudity * * * depicted for the purpose of sexual stimulation or gratification" (Pet. 12), and he argues that when the language was changed to drop any reference to "nudity," the understanding was still that only nude portrayals would be prohibited. As the court of appeals pointed out, however, the fact that Congress dropped any mention of the word "nudity" in the law as enacted indicates that Congress "repudiated its earlier intention to confine the statute's coverage to nude exhibitions." Pet. App. 12a-13a.

Subsequent legislative history also supports the court of appeals' interpretation. When several amendments to the child pornography statutes were made in 1983, an early version of a Senate bill, S. 57, 98th Cong., 1st Sess., would have defined the word "simulated," a word used but not defined in the then-current law, to mean "the explicit depiction of any ['sexually explicit conduct' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks." S. Rep. No. 169, 98th Cong., 1st Sess. 13 (1983). A letter

from the Department of Justice criticized this proposed language (*ibid.*):

> We believe that S. 57 defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions. For example, the child pornography provisions should protect a child against pornographers who would film him or her totally clothed in a body stocking engaging in simulated sexual intercourse with an adult or another child. The harm to children used by adults in this manner to produce pornography is significant even though the child may be clothed. * * * S. 57's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.

The language was then dropped from the amendments that were enacted. The legislative background thus provides support for the court of appeals' conclusion that the term "exhibition" should be given its natural meaning, *i.e.*, not to require that the areas exhibited be nude.

2. Petitioner further argues (Pet. 26-30) that the court of appeals' interpretation of the statute renders it unconstitutionally vague and overbroad. He contends that the Third Circuit's construction of the statute to cover clothed depictions of minors threatens to criminalize a wide variety of innocent and harmless photographs of children. The court of appeals correctly rejected that argument.

The court of appeals found that the federal statute was not vague and overbroad. As the court of appeals stated, "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sugges-

tive and unnaturally focused on the genitalia to qualify as lascivious." Pet. App. 19a. Furthermore, the court observed that "[e]ven fewer images where a minor's genital area is not fully exposed will constitute a lascivious exhibition since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness." *Ibid.*; see *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), cert. denied, 484 U.S. 856 (1987); see also *United States* v. *Wolf*, 890 F.2d 241, 244 (10th Cir. 1989); *United States* v. *Villard*, 885 F.2d 117, 123 (3d Cir. 1989). In short, the court of appeals correctly found that "including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute 'directed at the hard core of child pornography.'" Pet. App. 19a, quoting *New York* v. *Ferber*, 458 U.S. at 773.

3. Petitioner finally contends (Pet. 22-26) that he lacked the necessary mental state to be found guilty of violating Section 2252, because he had no idea that the depictions he received and possessed were prohibited by the statute. The court of appeals correctly rejected that claim.

Petitioner's claim is essentially that he made a mistake of law, and that no reasonable person would have expected that depictions of the type he possessed would be held to fall within the definition of child pornography. That claim is undermined by petitioner's use of a false name and address in communicating with purveyors of the materials he purchased. Pet. App. 2a-3a. And, as the court of appeals stated, petitioner clearly was "aware that the videotapes contained sexually oriented materials designed to

sexually arouse a pedophile." *Id.* at 24a. Indeed, the promotional brochures made clear that the tapes portrayed children. *Id.* at 5a. This Court said in *Hamling* v. *United States*, 418 U.S. 87, 123 (1974), in the context of an obscenity statute, that it was sufficient to show that the defendant had knowledge of the nature and contents of the materials, and that he need not be shown to know that they were illegal. There is similarly no requirement in the child pornography statutes that the defendant know the materials are illegal. Pet. App. 22a-23a. See also *United States* v. *Moncini*, 882 F.2d 401, 405-406 (9th Cir. 1989).

In light of the explicit descriptions of the materials petitioner ordered and the finding of the courts below that he was aware of the nature of the materials, "he must bear the risk of the potential illegality of his conduct." *United States* v. *Moncini*, 882 F.2d at 405. Although there had not been any prosecutions involving minors who were clothed, or any court decisions reaching the question whether clothed depictions may constitute "lascivious exhibition," there was no decision contrary to the interpretation reached by the court of appeals in this case. Moreover, as the court explained, its interpretation of the statute is supported by the language of the statute, its legislative history, and the underlying rationale of child pornography statutes. In short, "[t]his is not a case where due process prohibits convicting a defendant who has unwittingly broken the law through conduct which an ordinary person would not assume to be at least potentially criminal." *United States* v. *Moncini*, 882 F.2d at 406. Compare *Bouie* v.

City of Columbia, 378 U.S. 347 (1964); *Lambert* v. *California*, 355 U.S. 225 (1957).*

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* The Ninth Circuit has recently held 18 U.S.C. 2252 unconstitutional on its face because of that court's finding that the statute contains no requirement that the defendant have knowledge that the persons depicted in the materials are children. *United States* v. *X-Citement Video, Inc.*, 982 F.2d 1285 (1992). Every other circuit that has considered the question has found to the contrary, either directly or implicitly. See, *e.g.*, *Rodriguez* v. *Clark Color Laboratories*, 921 F.2d 347, 349 (1st Cir. 1990); *United States* v. *Petrov*, 747 F.2d 824, 828-829 (2d Cir. 1984), cert. denied, 471 U.S. 1025 (1985); *United States* v. *Osborne*, 935 F.2d 32, 34 & n.2 (4th Cir. 1991); *United States* v. *Marchant*, 803 F.2d 174, 176-177 (5th Cir. 1986); *United States* v. *Johnson*, 855 F.2d 299, 306 (6th Cir. 1988); *United States* v. *Duncan*, 896 F.2d 271, 277-278 (7th Cir. 1990); *United States* v. *LaChapelle*, 969 F.2d 632, 638 (8th Cir. 1992); *United States* v. *Garot*, 801 F.2d 1241, 1246-1247 (10th Cir. 1986). A rehearing petition is pending in the *X-Citement Video* case, and petitioner does not argue that Section 2252 lacks a scienter requirement. Moreover, it is clear in this case that petitioner knew both the nature and character of the contents of the tapes he ordered, as well as the fact that the persons depicted on the tapes were minors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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